No. 87-5425

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In The
Supreme Court of the United States
October Term, 1987

PRENTISS HOUSTON,

Petitioner,

v.

LARRY LACK,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals lacked jurisdiction of a *pro se* petitioner's appeal from the district court's denial of a writ of habeas corpus when the petitioner delivered his notice of appeal to prison authorities for mailing three days prior to the due date but the notice was received and filed by the clerk one day late.

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No. 87-5428

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PRENTISS HOUSTON,

Petitioner,

v.

LARRY LACK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

On November 15, 1982, after entering a plea of guilty, the petitioner was convicted in the Circuit Court of Obion County, Tennessee, of murder in the second degree and was sentenced to a term of fifty (50) years in the state penitentiary. He subsequently filed a petition for post-conviction relief in the trial court, alleging involuntariness of his plea and ineffective assistance of counsel. Fol-

lowing an evidentiary hearing at which the petitioner was represented by counsel, the trial court denied post-conviction relief. The Court of Criminal Appeals of Tennessee affirmed the judgment and the Supreme Court of Tennessee denied review.

On May 15, 1985, the petitioner filed in the district court a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging involuntariness of his guilty plea and ineffective assistance of counsel. (Dist. Ct. Ex. 2). On January 6, 1986, the district court entered an order dismissing the petition. (J.A. 2). On January 7, 1986, a judgment on the decision of the court was entered. (J.A. 19).

On February 7, 1986, thirty-one (31) days after the date of entry of the judgment, the petitioner's notice of appeal was filed with the district court clerk. (J.A. 21). No extension of time for filing the notice of appeal was requested from or granted by the district court. On February 18, 1986, the district court granted a certificate of probable cause. (J.A. 22).

The district court record was transmitted to the court of appeals, the appeal was docketed, and a briefing schedule was established. On March 21, 1986, the court of appeals, noticing the untimely filing of the notice of appeal, entered an order requiring the petitioner to show cause in writing not later than twenty-one (21) days therefrom why the appeal should not be dismissed for lack of jurisdiction. (J.A. 23). The court further ordered the briefing schedule to be held in abeyance pending resolution of the jurisdictional question. (J.A. 23).

On April 3, 1986, the petitioner filed a response to the court's show-cause order stating that until January 13, 1986, he was confined at an institution where a severe riot had occurred in 1985, that the institution's legal materials were destroyed during the riot, and that there was a "lock-down" of all inmates, which continued "up and until the month of January and afterwards". The petitioner alleged that at the time he received the district court's order of dismissal he was having to work six days a week and the legal material had not yet been adequately restored. The petitioner stated that on January 13, 1986, he was transferred to another institution, where he was required to undergo "orientation" for the first week, following which he "began his appeal". He alleged that on February 3, 1986, he "forwarded" his appeal, believing that the date of mailing would be the filing date. He further alleged that he requested the institution to certify that his appeal had been mailed before the expiration date and requested that it be sent airmail, but institutional policy required him to pay these additional costs and he was without sufficient funds to do so.[1] (J.A. 26). In a separate pleading, the petitioner asked the court of appeals to accept his appeal, citing *Fallen v. United States*, 378 U.S. 139 (1964). (J.A. 25).

On August 23, 1986, the court of appeals entered an order appointing counsel on the appeal and requesting

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[1]To demonstrate that he mailed his notice of appeal on February 3, 1986, the petitioner attached to his response a copy of a log sheet of outgoing legal mail for that date, bearing a notation, "Prentiss Houston United States Dist. Court of appeal Box 909 Jackson, TN 38302". (J.A. 28). The correct address for the district court clerk is P. O. Box 756, Jackson, Tennessee 38301.

appointed counsel to brief the jurisdictional issue as one of the issues on appeal. (J.A. 29). Following the filing of briefs by both the petitioner and the respondent, the court of appeals scheduled oral argument. At the close of argument, the court dismissed the appeal in open court. On May 22, 1987, the court entered a written order dismissing the case "for want of jurisdiction". (J.A. 31). On July 10, 1987, the petitioner's request for a rehearing *en banc* was denied. (J.A. 32).

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SUMMARY OF ARGUMENT

The timely filing of a notice of appeal under Rule 4, Fed. R. App. P., is "mandatory and jurisdictional". The instant civil appeal was subject to the time requirements of Rule 4(a) and 28 U.S.C. § 2107, which provide that the notice must be filed within thirty days of the date of the entry of judgment. Under Rule 4(a)(5) the district court may grant an extension for "excusable neglect or good cause" upon motion filed not later than thirty days after the expiration of the original thirty-day period. The notice must be received by the clerk before the time has expired.

In the instant case, the petitioner's notice of appeal was filed one day late. No motion for extension of time was filed by the petitioner and the thirty-day grace period had expired by the time the case was docketed in the court of appeals. Rule 26(b), Fed. R. App. P., prohibits a court of appeals from enlarging the time for filing a notice of appeal, and present Rule 4(a)(5), specifically providing

that a motion must be filed with the district court to obtain an extension, precludes a construction of the late-filed notice as a motion requesting an extension of time. The petitioner's failure to file a timely notice of appeal, followed by a failure to make a timely motion for an extension, extinguished his appeal and deprived the court of appeals of jurisdiction to entertain it.

The petitioner's reliance upon this Court's prior decisions in *Fallen v. United States*, 378 U.S. 139 (1964), and *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and its progeny, is misplaced. First, *Fallen*, a criminal case in which this Court excused the timely filing of a notice of appeal where appellant did "all he could under the circumstances" to perfect his appeal, is inapplicable to civil appeals. In civil cases, Congress has specifically provided by statute a time limit for civil appeals. 28 U.S.C. § 2107. Congressionally mandated jurisdictional limits cannot be waived by the courts.

Second, *Fallen* is factually distinguishable from the instant case. The petitioner in this case, who was neither ill nor handicapped, had thirty days to file the one-sentence notice of appeal, yet he waited until the twenty-seventh day to mail his notice. Moreover, the petitioner mailed the notice to an incorrect address. It cannot be said that the petitioner in this case did "all he could" to perfect his appeal.

Third, the "unique circumstances" doctrine, permitting an appellant to maintain an otherwise untimely appeal in "unique" circumstances in which the appellant reasonably relied upon judicial action indicating that the appeal would be timely, is plainly inconsistent with this Court's

decisions in *United States v. Locke*, 471 U.S. 84 (1985), *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 (1982), and *Browder v. Director, Department of Correction of Illinois*, 434 U.S. 257 (1978).

Fourth, *Harris* and its progeny are distinguishable from the instant case. These cases do not support the petitioner's contention that an otherwise untimely notice of appeal may be excused in the presence of "unique circumstances." Furthermore, in the instant case, there was no explicit action by the district court upon which the petitioner could place reasonable reliance that his appeal was timely.

Rule 60, Fed. R. Civ. P., prescribes the procedure by which a party may obtain relief from a final judgment. Rather than seeking relief pursuant to Rule 60, the petitioner has asked the court of appeals and this Court to adopt an equitable exception to Rule 4 for *pro se* prisoners, a course which, if followed, would emasculate the requirements of Rule 4 and extend the jurisdiction of the courts of appeals beyond statutory limits.

ARGUMENT

I. THE PETITIONER'S UNTIMELY NOTICE OF APPEAL DEPRIVED THE COURT OF APPEALS OF JURISDICTION.

For an appeal from a decision of a district court, the Federal Rules of Appellate Procedure require the filing of a "notice of appeal with the clerk of the district court

within the time allowed by Rule 4." Rule 3(a), Fed. R. App. P. Receipt by the clerk constitutes "filing". *See Parissi v. Telechron, Inc.*, 349 U.S. 46, 47 (1955) (per curiam). The Court has recognized that "[a]nything short of delivery" would leave the filing a disputable fact. *United States v. Lombardo*, 241 U.S. 73, 77 (1916).

This Court has repeatedly held that the timely filing of a notice of appeal is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the Court of Appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *Browder v. Director, Department of Correction of Illinois*, 434 U.S. 257, 264 (1978); *United States v. Robinson*, 361 U.S. 220, 224 (1960).

The clear purpose of the rule is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made, and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose." *Browder, supra*, at 264, quoting *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943).

A habeas corpus action is considered a "civil" matter and thus subject to the time requirements set forth in Rule 4(a), Fed. R. App. P. *Browder, supra*, at 264 n. 9. In a civil appeal not involving the United States government, the notice of appeal must be filed within thirty (30) days of the date of entry of the judgment appealed from. Rule 4(a)(1), Fed. R. App. P.; 28 U.S.C. § 2107. Rule

4(a)(5) provides for extensions of time in certain circumstances:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed in this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of the entry of the order granting the motion, whichever occurs later.

In the instant case, the district court's judgment was entered on January 7, 1986. The petitioner's notice of appeal was filed with the district court clerk thirty-one (31) days later, on February 7, 1986, one (1) day late under Rule 4(a)(1). There was no motion for extension of time filed by the petitioner, and the grace period had expired by the time the case was docketed in the court of appeals. Since Rule 26(b), Fed. R. App. P., prohibits a court of appeals from enlarging the time for filing a notice of appeal, *see Griggs, supra,* at 61 n.3 (1982), the court of appeals properly concluded that it was without jurisdiction to entertain the appeal.

The petitioner contends that the court of appeals should have construed his notice of appeal as a motion for an extension of time for filing a notice of appeal. Prior to the 1979 amendment to Rule 4(a)(5), the pertinent portion of Rule 4(a) stated that:

> Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Before the rule's amendment, the requirement of a motion for an extension was less explicit.

One of the primary purposes of the 1979 amendment was to remove the possibility of an informal application for an extension of time. Rule 4(a)(5), as amended, however, specifically conditions an extension of time for filing a notice of appeal upon the filing of a motion within thirty days after the expiration of the initial thirty-day filing period. The notes of the Advisory Committee on Appellate Rules state:

> The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date. . . .
>
> Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an informal application. The amendment would require that the application must be made by motion, though the motion may be made *ex parte*. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F.R.C.P. and local rules of the district court.

The requirement in Rule 4(a)(5) that an extension for filing a notice of appeal in civil cases be obtained only by motion is contrasted with, and reinforced by, the provision in Rule 4(b) for filing a notice in criminal cases, permitting the district court to extend the time for filing, before or after the time has expired, "with or without motion and notice" upon a showing of excusable neglect. Every federal circuit which has considered the issue has agreed that the present Rule 4(a) prohibits the construction of a late-filed notice of appeal as a motion requesting an extension of time. *See United States v. O'Leary*, 788 F.2d 1238 (7th Cir. 1986); *Herman v. Guardian Life Insurance Company of America*, 762 F.2d 288 (3rd Cir. 1985); *Myers v. Stephenson*, 748 F.2d 202 (4th Cir. 1984); *Shah v. Hutto*, 722 F.2d 1167 (4th Cir. 1983) (*en banc*), *cert. denied*, 466 U.S. 975 (1984); *Campbell v. White*, 721 F.2d 644 (8th Cir. 1983); *Pryor v. Marshall*, 711 F.2d 63 (6th Cir. 1983); *Brooks v. Britton*, 669 F.2d 665 (11th Cir. 1982); *Pettibone v. Cupp*, 666 F.2d 333 (9th Cir. 1981); *Wyzik v. Employee Benefit Plan of Crane Company*, 663 F.2d 348 (1st Cir. 1981); *Mayfield v. United States Parole Commission*, 647 F.2d 1053 (10th Cir. 1981); *Sanchez v. Board of Regents of Texas Southern University*, 625 F.2d 521 (5th Cir. 1980).

In view of the plain wording of present Rule 4(a)(5), the clear intent of the drafters of the 1979 amendment, and the virtual unanimity among the circuits, this Court should decline to adopt the petitioner's suggestion that courts of appeals be allowed to treat late-filed notices of appeal in civil cases as motions for extension of time. The petitioner's failure to file a timely notice of appeal, followed by

failure to make a timely motion for an extension, extinguished the petitioner's right to appeal.

II. THE PETITIONER'S RELIANCE UPON THIS COURT'S PRIOR DECISIONS IN FALLEN v. UNITED STATES AND HARRIS TRUCK LINES, INC. v. CHERRY MEAT PACKERS, INC. IS MISPLACED.

A. The Rule In Fallen Is Inapplicable To Civil Appeals.

The petitioner concedes the mandatory and jurisdictional nature of a notice of appeal, but contends that under this Court's decision in *Fallen v. United States*, 378 U.S. 139 (1964), technical compliance with the time requirements of Rule 4 may be excused under extraordinary circumstances. In *Fallen*, the appellant was a federal prisoner seeking direct appeal from his federal court criminal conviction. Immediately after sentencing Fallen's attorney told him he would be unable to represent him on appeal and that Fallen should secure another attorney promptly to avoid the loss of an appeal right. However, Fallen was ill and was taken the next day to a hospital, where he was not permitted to have visitors and was unable to secure a new attorney. Several days later, Fallen felt well enough to write and wrote two letters: one asking for a new trial and another requesting that his case be appealed. The letters were promptly mailed and would, in the normal course of events, have been received by the clerk within the ten days provided by the rule for filing the notice of appeal. However, because of either a delay in mail delivery or the mail procedure in the federal prison, Fallen's letters were not received until fourteen days after sentencing. Finding that Fallen "did all he could under

the circumstances," the Court concluded that the delay in filing was not properly chargeable to him and ordered the court of appeals to hear the appeal on the merits. 378 U.S. at 144.

Unlike *Fallen*, the instant case is civil in nature. In civil cases, Congress has specifically provided by statute a time limit for appeals to the courts of appeals. Section 2107 of Title 28, U.S.C., provides, in pertinent part:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> . . .
>
> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

There is no like statutory provision for criminal appeals.[2]

Although the rule-making process has resulted in a modification of the required showing for an extension of time to a standard of "excusable neglect or good cause", the time limits prescribed by 28 U.S.C. § 2107 for the tak-

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[2]The power to promulgate rules prescribing "the times for and manner of taking appeals [to the courts of appeals] and applying for writs of certiorari" in criminal cases is given to the Supreme Court. 18 U.S.C. § 3772.

ing of an appeal in a civil case have not been changed.[3] Congressionally mandated jurisdictional limits may not be overcome by equitable arguments, even in situations that might call for such a result under a court rule. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 472-475 (1978); *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264 (1942) (holding that a petition for writ of certiorari must be dismissed for want of jurisdiction where the petition was filed beyond the statutory ninety-day period in a civil case).

On the other hand, filing time requirements established by court rule, as distinguished from a requirement promulgated by statute, are not inherently jurisdictional. *Schacht v. United States*, 398 U.S. 58, 63-64 (1970) (holding that the Court's rule establishing a thirty-day time limitation for filing a petition for a writ of certiorari in a federal criminal case is not jurisdictional, noting that "it must be remembered that this rule was not enacted by Congress but was promulgated by this Court under author-

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[3]The Federal Rules of Appellate Procedure are drawn under the authority of 28 U.S.C. § 2072, 28 U.S.C. § 2075, 18 U.S.C. § 3771, and 18 U.S.C. § 3772, which "give to the Supreme Court power to make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals. By the terms of the statutes, after the rules have taken effect all laws in conflict with them are of no further force or effect." Notes of Advisory Committee on Appellate Rules, Rule 1, Fed. R. App. P. At the same time, these statutes do not give the Court any authority to modify, abridge, or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of courts of appeals. *United States v. Sherwood*, 312 U.S. 584, 589-590 (1941) (construing an earlier statute giving the Court power to prescribe rules of procedure in civil actions in federal district courts); Rule 1(b), Fed. R. App. P.; 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3947 (1977 ed.).

ity of Congress to prescribe rules concerning the time limitations of taking appeals and applying for certiorari in criminal cases."). *See also* 398 U.S. at 68 (Harlan, J., concurring) ("Because we cannot 'waive' congressional enactments, the statutory time limits are treated as jurisdictional."). The time limits for filing a notice of appeal in civil cases, prescribed by 28 U.S.C. § 2107 and applied through Rule 4(a), Fed. R. App. P., are jurisdictional and not waivable. Therefore, the holding in *Fallen* that the timely filing of a notice of appeal may be excused where the petitioner had done "all he could under the circumstances", is inapplicable to the instant civil case.

B. Fallen Is Factually Distinguishable From This Case.

Even assuming that *Fallen* is applicable to civil cases, the instant case is factually distinguishable. In *Fallen*, the petitioner, a paraplegic who was suffering from the flu, had only ten days from sentencing to appeal. Immediately after the sentencing hearing his attorney informed him that he would not represent him on appeal and that he should secure another attorney promptly. After this brief conference, the petitioner was taken to a medical center and the next day was transferred to hospital facilities in Atlanta to begin his sentence. At neither institution was he permitted visitors. On the eighth day after sentencing, the petitioner felt well enough to write and promptly mailed that same day two letters to the district court in Jacksonville asking for a new trial and an appeal. In the normal course of events, the letters would have been received by the clerk within the ten days, but in fact they were not received by the clerk until the fourteenth day

after sentencing because of a delay in the mail pickup at the prison.

In this case, the petitioner had thirty days within which to appeal, but did not mail the notice of appeal until the twenty-seventh day. The petitioner was neither ill nor handicapped. In response to the court of appeals' show-cause order, the petitioner acknowledged receipt of the district court's January 6, 1986, order while he was incarcerated. (J.A. 26). Although he alleged that as a result of a prison riot several months earlier he did not have adequate access to legal materials at that institution, he admitted that he was transferred to another state prison, Lake County Regional Correctional Facility, on January 13, 1986, (J.A. 26-27), which was twenty-four days prior to the filing deadline. The petitioner made no claim as to the adequacy of access to legal materials at that institution. He alleged that during the first week at the new prison he was required to undergo orientation procedures, but alleged no other obstacles to the perfection of his appeal. (J.A. 27). The petitioner stated no reason for waiting until February 3, 1986, three days before the filing deadline, to deposit the one-sentence notice of appeal for mailing with prison authorities.

Despite the petitioner's dilatoriness, it is reasonable to assume that the notice of appeal would have reached the clerk's office in Jackson for timely filing by February 6 had the petitioner not posted the notice to an incorrect address. As indicated by the prison mail log, the petitioner's February 3 correspondence to the district court in Jackson, Tennessee, was addressed to "Box 909" (J.A. 28), the mailing address for the Clerk of the Supreme

Court of Tennessee at Jackson, rather than Box 756, the correct address for the district court clerk in Jackson.

The petitioner in this case clearly did not do "all he could under the circumstances" to get his notice of appeal to its destination within the required thirty days. Should this Court conclude that the principle of *Fallen* is applicable to civil cases, the respondent submits that the instant case is factually distinguishable.

C. The "Unique Circumstances" Doctrine Established By Harris And Its Progeny Is Plainly Inconsistent With Subsequent Decisions Of This Court.

The petitioner also contends that three *per curiam* decisions of this Court, *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964), and *Wolfsohn v. Hankin*, 376 U.S. 203 (1964), establish a "unique circumstances" doctrine permitting the late notice of appeal in the instant case.

In *Harris* the appellant moved during the initial filing period for an extension of time to file his notice of appeal. Under Rule 73(a), Fed. R. Civ. P., the predecessor to former Rule 4(a), Fed. R. App. P., a thirty-day extension of the initial filing period was permitted if an extension was justified by "excusable neglect based on a failure of a party to learn of the entry of the judgment." 371 U.S. at 217. The district court found excusable neglect and granted a two-week extension from the end of the initial filing period. The court of appeals reversed the finding of excusable neglect and concluded that, because of the absence of excusable neglect, the notice of appeal was untimely filed and the appeal was required to be dismissed. 371 U.S. at 216. This Court reversed, stating:

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling.

371 U.S. at 217.

In *Thompson*, the district court entered a final order denying relief. The appellant then filed untimely post-trial motions under Rule 52, Fed. R. Civ. P., to amend certain findings of fact and under Rule 59, Fed. R. Civ. P., for a new trial. 375 U.S. at 385. The government raised no objection to the timeliness of the motions and the district court specifically declared them to be timely. *Id.* Within the sixty-day time limit under Rule 73(a) from the date of the district court's denial of the motions (but not from the date of the original order) the appellant filed a notice of appeal. Although the motions were untimely, this Court, with four justices dissenting, reversed the court of appeals' dismissal, holding that Rule 73(a) was satisfied because of the "unique circumstances" of the appellant's reliance on the district court's error. *Id.* at 387.

The *Wolfsohn* case presented the same fact situation as *Thompson*, *see Wolfsohn v. Hankin*, 321 F.2d 393 (1963), and the Court, in a one-sentence order, with four justices

dissenting, reversed the judgment under the authority of *Harris* and *Thompson*. 376 U.S. at 203.

Following the decisions in these three cases, the Court has remained silent on the "unique circumstances" doctrine for more than twenty years. In the interim, the Court has decided at least three cases which have drained the "unique circumstances" doctrine of vitality, if not overruled it by implication. In *United States v. Locke*, 471 U.S. 84 (1985), a claimant's mining claims were extinguished under the Federal Land Policy and Management Act for failing to meet the annual filing deadline by one day. Against the claimant's contentions that the statute was ambiguous, that he had relied on a misleading official construction, and that he had not adequately researched the question, this Court noted:

> The notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the least, a surprising notion, and it is a notion without limiting principle. If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. "Any less rigid standard would risk encouraging a lax attituude toward filing dates," *United States v. Boyle*, 469 U.S., at —, 105 S.Ct., at 692. A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day.

471 U.S. at 100-101.

In *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 (1982), the Court held that a notice of appeal filed in advance of a Rule 59 motion becomes a nullity when the Rule 59 motion is filed, and that an appellant must re-file a new and timely notice of appeal or forfeit review. 459 U.S. at 61. The decision enforced the literal language of Rule 4(a)(4), Fed. R. App. P., over the contention that the defects in a premature notice of appeal could be waived under Rule 2, Fed. R. App. P. The Court stated that

> Rule 2 does not purport to vest unlimited discretion in the court of appeals. That Rule explicitly states that the discretion it authorizes is limited by Rule 26(b), which prohibits courts of appeals from enlarging the time for filing a notice of appeal.

459 U.S. at 61 n 3.

In *Browder v. Director, Department of Correction of Illinois*, 434 U.S. 257 (1978), twenty-eight days after judgment a party filed in the district court a motion for a stay and for an evidentiary hearing. The district court granted the motion, conducted an evidentiary hearing, and later entered a new judgment. This Court held the appeal untimely. Although the district court had granted the motion at a time when there was still time left for an appeal of the original judgment, the motion, ineffective under Rule 59, was held not to have tolled the appeal period. This Court repeatedly emphasized the litigants' interest in finality. 434 U.S. at 264, 271.

The "unique circumstances" doctrine, permitting an appellant to maintain a notherwise untimely appeal in unique circumstances in which the appellant reasonably relied upon judicial action indicating that his appeal would

be timely, is plainly inconsistent with these recent decisions. This Court should expressly reject the doctrine and adopt the reasoning of the dissent in *Thompson*:

> Rules of procedure are a necessary part of an orderly system of justice. Their efficacy, however, depends upon the willingness of the courts to enforce them according to their terms. Changes in rules whose inflexibility has turned out to work hardship should be effected by the process of amendment, not by *ad hoc* relaxations by this Court in particular cases. Such dispensations in the long run actually produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar.

375 U.S. at 390 (Clark, J., dissenting).

D. Harris, Thompson, And Wolfsohn Are Distinguishable From This Case.

Assuming arguendo that *Harris*, *Thompson*, and *Wolfsohn* remain valid precedent, the principles announced therein are inapplicable to this case. *Harris*, *Thompson*, and *Wolfsohn* do not support the petitioner's contention that an otherwise untimely notice of appeal may be excused in the presence of "unique circumstances". Indeed, the *Harris* case does not address the issue of whether a district court can extend the filing period beyond the allowable time provided by the rule. The extension granted by the district court was well within the thirty days allowed by Rule 73(a).

Likewise, *Thompson* does not support the petitioner's position in this case. Since timely motions under Rules 52 and 59 would have tolled the running of the initial time period of Rule 73(a), the question in *Thompson* was whether the Rule 73(a) time period was triggered, not whether that time period could be extended beyond its limits. The *Wolfsohn* case, presenting the same facts as *Thompson*, is also distinguishable for the same reasons.

Moreover, the instant case is factually distinguishable from those cases. The petitioner essentially claims that "unique circumstances" are present because the appeal was routinely processed and was not dismissed until after his time period for an extension had lapsed. However, the key element of the "unique circumstances" doctrine is that the party must reasonably rely on judicial action taken prior to the expiration of the time period for appeal. In this case, the petitioner did not request, nor did the district court or the court of appeals purport to grant, an extension of time for the filing of the notice of appeal. The granting of a certificate of probable cause by the district court, being merely the primary means of separating meritorious from frivolous appeals, *Barefoot v. Estelle*, 463 U.S. 880, 892-893 (1983), is not a basis for reasonable reliance that an appeal is timely. There being no explicit judicial action upon which the petitioner could have reasonably relied, the "unique circumstances" found in *Harris*, *Thompson*, and *Wolfsohn* are not present.

III. THE PETITIONER COULD HAVE SOUGHT RELIEF IN THE DISTRICT COURT UNDER RULE 60, FED. R. CIV. P.

Although Rule 4(a)(5) already provides for a remedy for late-filed notices of appeal, the petitioner suggests that the Court should adopt an additional equitable exception to Rule 4 for *pro se* prisoners, noting the Court's leniency

in applying the rules of practice and pleading to *pro se* prisoners in such cases as *Darr v. Burford,* 339 U.S. 200 (1950), *Price v. Johnston,* 334 U.S. 266 (1948), and *Holiday v. Johnston,* 313 U.S. 342 (1941). It is significant that none of these cases involved the waiver of a mandatory and jurisdictional filing requirement. The course suggested by the petitioner would emasculate the requirements of Rule 4 and extend the jurisdiction of the courts of appeals beyond statutory limits.

The petitioner also suggests that the clerks' offices should screen notices of appeals and, in the event of untimely filing, notify *pro se* litigants of the necessity of filing a motion for extension. The present rules do not require the clerks to perform that function and such a change in the rules is better left to the rules amendment process and congressional approval.

Rule 60, Fed. R. Civ. P., prescribes the procedures by which a party may obtain relief from a final judgment. "The rule attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2851 (1973 ed.). Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the

> judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer requitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Except in truly extraordinary cases, Rule 60(b) relief should not be used to extend the time for appeal, for it squarely collides with Rule 4(a)(5), Fed. R. App. P., which embodies the significant principle of protecting the finality of judgments. *United States v. O'Neil,* 709 F.2d 361, 373 (5th Cir. 1983). However, this Court recognized in *Klapprott v. United States,* 335 U.S. 601 (1949), that Rule 60(b)(6) "vests powers in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." 335 U.S. at 615.

Relief under Rule 60(b) has been recognized as appropriate to remedy an excusable failure to take a timely appeal. *Rodgers v. Watt,* 722 F.2d 456, 459 (9th Cir. 1983)

(*en banc*) (emphasizing that Rule 60(b) relief is available only if the excusable neglect arises after the sixty-day period provided by Rule 4(a)). *Felshina v. Schweiker*, 707 F.2d 71, 71 (2d Cir. 1983); *Martella v. Marine Cooks & Stewards Union, Seafarers International Union of North America, AFL-CIO*, 448 F.2d 729, 730 (9th Cir. 1971) (denying relief, but recognizing the availability of Rule 60(b)(6) relief to a petitioner who can establish "the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal"). In *Browder, supra*, this Court recognized that despite the finality of the original judgment, the district court had the authority to grant relief from the judgment under Rule 60(b). 434 U.S. at 263 nn. 7 & 8, and 434 U.S. at 272-274 (Blackmun. J., concurring). *See also James v. United States*, 459 U.S. 1044, 1046-1047 (1982) (Brennan, J., respecting the denial of the petition for writ of certiorari), noting the possible use of Rule 60(b) under "unique" or "extraordinary" circumstances to vacate a judgment to permit reentry of a fresh judgment from which a timely appeal can be taken.

The respondent submits that Rule 4(a)(5), allowing an extension of time for filing a notice of appeal upon a showing of "excusable neglect or good cause", is the sole relief available to an appellant in a civil case for failing to meet the mandatory and jurisdictional requirement of a timely notice. However, should this Court find that additional relief should be available in truly extraordinary cases, the respondent suggests that Rule 60 may already provide such relief. The petitioner could have sought relief from the district court on the basis of his claimed

"unique" and "extraordinary" circumstances. The resolution of such an issue is more appropriate for a district court, which is capable of taking evidence and making findings of fact.[4] Appellate courts are ill-suited to the task of fashioning equitable relief upon facts not adequately developed below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[4]The petitioner contends for the first time in this Court that the notice of appeal may have arrived at the clerk's office prior to the date upon which it was filed and requests a remand on that issue. As with the other factual contentions of the petitioner, this claim could have been presented to the district court pursuant to Rule 60.